IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04/10/2004

CORAM

THE HONOURABLE MR.JUSTICE V.KANAGARAJ
AND
THE HONOURABLE MR.JUSTICE T.V.MASILAMANI

Criminal Appeal No.1060 of 2001

Veeraiyan ..Appellant.

-Vs-

State by Inspector of Police,
Edaiyur Police Station,
Nagai District,
Cr.No.277/2000 ..Respondent.

Criminal Appeal against the judgment dated 03.10.2001 in S.C.No.114 /2001 on the file of Principal Sessions Judge, Nagapattinam.

!For Appellant : Mr.S.Swamidoss Manokaran

^For Respondent : Mr.E.Raja, Addl.P.P.

:J U D G M E N T
(The Judgment of the Court was delivered by V.KANAGARAJ,J)

This Criminal Appeal has been preferred against the judgment dated 3-10-2001 rendered in S.C.No. 114 of 2001 by the Court of Principal Sessions Judge, Nagapattinam, thereby convicting the appellant/ accused for the commission of offences punishable under Sections 449 and 302 I.P.C. and sentencing him to undergo rigourous imprisonment for a period of five years and a sentence of imprisonment for life and acquitting the accused for yet

another commission of offence punishable under Section 341 I.P.C. for which also he stood charged before the trial Court.

2. The charge as framed against the appellant was that living in illicit intimacy with the wife of the deceased Krishnan, the accused was in the habit of ill-treating the deceased also and while so, since the deceased witnessed the ugly scene of the appellant and his wife having illicit intercourse, he started questioning such of the relationship of the appellant with his wife and aggrieved at this, intending to cause the death of the deceased, the accused on 10-1 1-2000 at 7.00 a.m. trespassed into the house of the deceased Krishnan and took a kerosene can with full of kerosene and pouring the same on the body of the deceased and while the deceased started running away from the scene, the appellant wrongfully restrained him and dragging him into the house poured the kerosene all over the body of the deceased Krishnan and set him on fire, as a result of which, he sustained serious burn injuries and was removed to the Thiruthuraipoondi Government Hospital from where he was again taken to Thiruvarur Government Hospital, where the injured Krishnan died of burn injuries on 13-1 1-2000 and hence, the charge for the commission of offences under Sections 449, 341 and 302 I.P.C.

3. The Court of Principal Sessions Judge, Nagapattinam, having conducted the trial and on collection of such oral and documentary evidence and the material objects, of which, for the oral evidence 12 witnesses have been examined as P.Ws. 1 to 12 and for documentary evidence 17 documents have been marked as Exs. P.1 to 17, besides marking six material objects in proof of the case of the prosecution as M.Os. 1 to 6, on its part in its attempt to prove the case to the standards required under law that is with proof beyond reasonable doubts and appreciating these evidence placed on record the Court of Sessions, Nagapattinam, had ultimately arrived at the conclusion to hold that the appellant/accused had committed the offence under Sections 302 and 44 9 I.P.C. and holding him guilty under these two Sections, did not find reason to convict him for the offence under Section 341 IP.C. with which also he was charged and would award the punishments as afore mentioned.

4. It is only challenging the conviction and sentence as arrived at by the Court of Principal Sessions Judge, Nagapattinam, as per its judgment dated 3-10-2001 the convict has come forward to prefer the above Criminal Appeal on certain grounds as broughtforth in the grounds of Appeal such as that the Court below failed to appreciate the fact that P.Ws. 1 and 2 alleged eye witnesses have turned hostile; that the Court below has further failed to appreciate that P.W.3 who was examined by the prosecution to prove the dying declaration also turned hostile; that the Court below has not properly appreciated the motive part of the case, which has not been established by the prosecution; that the dying declaration in Ex.P.4 recorded by P.W.7 doctor, has not been recorded according to the mandatory procedure laid down by the Honourable Apex Court and as such it cannot be relied on; that the trial Court has brushed aside the fact that the post-mortem

certificate clearly shows that there was 100% burns on the deceased and moreover, the deceased has consumed alcohol prior to the occurrence; that the Court below having concluded that there is no enmity between the deceased and the appellant ought to have acquitted the appellant; that the Court below has not appreciated the fact that the appellant, who was 65 years old at the time of the occurrence would not have indulged in such activities as alleged by the prosecution. On such grounds, the appellant would ultimately pray to set aside the conviction and sentence arrived at by the trial Court in its judgment dated 3-10-2 001 and would pray to set him at liberty.

5. Today, when the above Criminal Appeal was taken up for consideration, learned counsel appearing on behalf of the appellant besides narrating the facts and events as it has been put forth on the part of the prosecution before the Court below would also point out certain vital aspects encircling the oral and documentary evidence, particularly focussing attention on the failure of prosecution in proving the case through P.Ws. 1 to 3, who have been examined for the purpose of speaking to the effect that they witnessed the occurrence on the spot, but all the three vital witnesses P.Ws. 1 to 3 have been treated hostile, since they did not come forward to support the case of the prosecution and therefore, it is a serious jolt to the case of the prosecution.

6. Learned counsel would further point out that the documents marked on the part of the prosecution, particularly that of Ex.P.4 the dying declaration, Ex.P.13 the complaint, Ex.P.6 the certificate issued by both the duty doctor and the Magistrate, who recorded the dying declaration and would point out that the dying declaration has been recorded even much earlier to the complaint. Since, the dying declaration on intimation by the duty doctor has been recorded by the Magistrate at 11.35 am on 10-11-2000 and only after a long time at about 1.00 p.m., Ex.P.13 complaint has been lodged before the Police and therefore, it is a case, wherein even prior to registering of a case, the dying declaration has been recorded and in accordance with the same, the case has been registered on the part of the Police, which is unbelievable.

7. Learned counsel would also cast aspersions on the version of the complaint and would doubt very much, whether such a complaint could have been lodged on the part of the deceased at a stage, where he was suffering cent percent burns and according to the learned counsel, it is very difficult in such circumstances for a patient to give such a statement, so as to be recorded by the Police in order to make it as the complaint.

8. Learned counsel would also find anomalies in the dying declaration pointing out certain alien materials or persons being broughtforth and would therefore, dub the same as unreliable.

9. On the contrary, this Court is able to find that in all these vital documents one thing has been pointedly stated on the part of the deceased, while he was in the hospital that it was the appellant/ accused, who came on the date and time alleged therein that was on 10-11 -2000 at about 7.00 a.m. with kerosene filled in a can and pouring it on his body and setting him on fire, as a result of which the said burn injuries were sustained and the motive for the appellant to do away with the deceased is that the appellant was in illicit intimacy with the wife of the deceased particularly since one day the deceased was able to witness the scene of the appellant having illicit intercourse with his wife, which came to be questioned on his part and therefore, in order to put an end to his life the appellant had resorted to indulge in the offence of murder in the manner alleged supra.

10. The other witnesses such as the mahazar witnesses P.Ws. 4 and 5 would also admit that they signed Ex.P.1 mahazar, wherein the recoveries of M.Os. 1 and 2 have been made. The Magistrate concerned coming forward to adduce evidence to the effect that on receipt of Ex.P.3 , he proceeded to the Government Hospital, Thiruthuraipoondi, at about 11.40 a.m. and questioning the injured Krishnan in order to know whether he was conscious fully, so as to adduce the dying declaration and on being satisfied, he started recording his statement, which came to be marked as Ex.P.4 dying declaration. The next important evidence given in favour of the prosecution case is by P.W.7 the Doctor, who prepared the accident report, wherein also the said Doctor has clearly mentioned that the patient was conscious, inspite of himself coming forward to adduce evidence to the effect that the burns were cent percent, before whom also the deceased had clearly stated that 'he was set on fire pouring kerosene on his body by a known person' and this Doctor would also vouch-safe that the patient was conscious, but would add that he was also seen to have consumed alcohol. The accident register issued by this witness would be marked as Ex.P.5. This witness is one, who sent Ex.P.3 intimation to the Magistrate for recording the dying declaration of the injured Krishnan. On receipt of which, P.W.6 Magistrate came to the hospital and recorded his dying declaration in the manner afore discussed. This witness would also adduce evidence that Ex.P.6 certificate has been issued by him to the effect that the patient was fully conscious at the time when the dying declaration was recorded, which comes to be seen in the oral evidence of P.W.7 and therefore, this Court is not able to find anything fishy or any doubtful circumstance was prevalent at the time of recording of the dying declaration, so far as the mental status and physical strength to adduce such declaration was concerned or his consciousness at that time and hence, the suspicion that is created on the part of the appellant to the effect that on account of cent percent burn injuries the injured would not have been in a position to give such statement before the Magistrate holds no water, more so, since the dyeing declaration has been recorded by the Magistrate himself in the presence of the Doctor, both of whom would ascertain that the patient was conscious and therefore, no doubt need be entertained regarding this aspect and hence, at this stage, it has to be decided that the patient at the time of recording of the dying declaration was fully conscious and no suspicion could be attributed to the same.

11. The other vital prosecution witness is the post-mortem doctor, who has been examined as P.W.8, who would also not only make it clear that the deceased was around 45 years of age and was seen with cent percent burn injuries, while giving description of the body at the time he performed the post-mortem, but this witness would also offer his opinion to the effect that the deceased would have died of the cent percent burn injuries and because of the septicaemia shock 18 to 24 hours prior to the conduct of the post-mortem. At this juncture, learned counsel would point out that in the post-mortem certificate Ex.P.8 it is stated 6 to 18 hours prior to post-mortem the deceased would have died, which is seen glaringly, but in the deposition P.W.8 doctor, who performed the post-mortem would adduce evidence to the effect that the death would have occurred 18 to 24 hours prior to postmortem. This minor anomaly might have occurred on account of typographical error. Among the both sequence, only in consideration of Ex.P.8 post-mortem certificate, P.W.8 has adduced evidence setting the time i.e., 18 to 24 hours prior to post-mortem the deceased would have died, which could only be in the natural course correct and therefore, this Court is of the view that this could be taken as the time of the death of the deceased. However, since there is no much controversy, so far as this point is concerned, it is not necessary on the part of this Court to go very deep into the same, so as to arrive at a conclusion.

12. The next important evidence is adduced by P.W.9, who is the Court staff, through whom Exs. P. 10 and 11 respectively the Chemical Examination Report and Serologist Report coupled with the Urological Report in Ex.P.12 would be marked. The other witnesses are P.Ws. 10 to 12, P.W. 10 being the police head-constable, who registered the F. I.R. regarding the statement of the deceased, while he was taking treatment in the hospital on 10-11-2000 and this witness would come forward to adduce evidence to the effect of registering the case in his Station Crime No.277 of 2000 for the offences under Sections 448, 341 and 307 I.P.C. and sending the same to Court and other police Officials and further inspecting the spot preparing Ex.P.15 rough sketch, causing recovery of M.O.3 can and M.Os. 1 and 2 lungi and the burned shirt. This witness would also recover M.Os. 5 and 6 banian and trouser respectively all under Mahazar Ex.P.2. He would then examine the mahazar witnesses and would entrust the case with the Inspector of Police for further investigation. The other witness P.W.11 is a Doctor in Thiruvarur Government Hospital at the relevant time and this witness would adduce evidence that on 11-11-2000, while he was on duty, the injured Krishnan was there with 100% burn injuries and that he was conscious; that he imparted medical assistance, who informed the wife of the deceased to take the deceased to Tanjore Medical College Hospital, since the burn injuries were 100%, but she declined to do so and hence, the treatment was imparted there itself and while so, on 13-1 1-2000 at about 6.15 a.m. since he became unconscious, inspite of emergency treatment imparted he died at 6.30 a.m. that day and the death intimation was given to the Police. P.W.12 is the Inspector of Police and the investigating Officer in this case, who would adduce evidence regarding his investigation, recording of statement of the other witnesses, collection of the documentary evidence and on completion of the investigation, filing of the charge sheet against the appellant on 19-1-2001 for the offences

punishable under Sections 449, 341 and 302 I.P.C.

13. In consideration of the facts and circumstances as adduced on the part of the witnesses, who are examined as P.Ws. 1 to 12, the documents which were marked as Exs. P.1 to 17 and the material objects broughtforth in M.Os. 1 to 6, having regard to all these evidence and having heard the learned counsel for the appellant and the learned Additional Public Prosecutor contra this Court is able to find that it is the case of the prosecution that on account of the death of one Krishnan alleged to have been caused by the appellant/accused because of the appellant keeping the wife of the deceased and the deceased having come to witness the scene of the appellant having sexual intercourse with her a month prior to the occurrence, inspite of a warning the appellant did not budge, but started ill treating the deceased and ultimately, questioning the validity of the deceased scolding his wife often and again, the appellant had caused the death of the deceased by pouring kerosene on him and setting him afire on 10-11-2000 and this offence was able to be committed by the appellant by wrongfully restraining the deceased, who started running away from the scene of the occurrence i.e., his residence, but dragging him inside his own house and setting him on fire by pouring kerosene on his body. Since the offence had been committed, the appellant came to be charged for the offences punishable under Sections 449, 341 and 302 I.P.C. and in the trial held, since the lower Court found him guilty for the offence of murder under Section 302 I.P.C. and for the offence under Section 449 I.P.C. awarding a sentence of life imprisonment and rigourous imprisonment for five years respectively for the said offences also found the offence under Section 341 I.P.C. not coming to be proved, as a result of which, acquitted the accused on that score and it is this judgment, which is being testified on those grounds extracted supra, the appellant has come forward to file the above Criminal Appeal.

14. On an over all consideration of the facts and circumstances encircling the whole affair connected to the causing of the death of the deceased Krishnan, even though P.Ws. 1 to 3, who were relied on by the prosecution for oral evidence particularly P.Ws. 1 and 2 figuring as eye witnesses to the occurrence, three witnesses have been treated as hostile by the prosecution, as a result of which only relying on the documentary evidence and the circumstances created by the other sources such as the medical evidence, police evidence, the report obtained from the chemical analyst centre, particularly the dying declaration given by the deceased on the date of occurrence itself with P.W.6 Magistrate in the presence of P.W.7 medical Officer, who was the author of Exs. P. 5 and 6, it is relevant to point out that the prosecution is greatly dependant on the dying declaration of the deceased adduced before the Magistrate in the presence of P.W.7 doctor, in which the appellant has been the only person accused of having committed the offence in the manner and for the reasons alleged as motive for the occurrence. It is pertinent to note that it is not only in this dying declaration, but also in the statement recorded by the headconstable, based on which the F.I.R. has been registered in the case, the deceased has very clearly stated that it was the appellant/accused, who was the only person

responsible for inflicting the burn injuries on the deceased by pouring the kerosene and setting him afire, at his own residence and therefore, so far as the dying declaration is concerned, either regarding the contents of the same or regarding the coming into being of the same in the presence of the Doctor and the Magistrate, both of whom have certified under Ex.P.6 to the effect that at the time of giving the dying declaration the patient was fully conscious and fit enough to give statement and therefore, absolutely there is no point in doubting the fidelity of the dying declaration, which has been recorded by the Magistrate in the presence of the duty doctor. All the admissions made on the part of the appellant to make inroads into the dying declaration proved futile and therefore, the prosecution has reason to rely on the dying declaration as the sole evidence available, besides the other circumstantial evidence made available through the documents the oral evidence, the reports and the material objects.

15. A careful perusal of the judgment of the lower Court would also reveal that the learned Judge has not only traced the facts and circumstances as pleaded on the part of the prosecution in approaching the case, but also having afforded sufficient opportunities for the parties to be heard, particularly to the appellant herein, who was the accused and after conducting a thorough trial and permitting the parties to record their evidence and in appreciation of those materials placed on record has reason to arrive at its conclusion to convict and sentence the accused in the manner broughtforth supra and this Court is not able to find any legal infirmity or inconsistency or factual error or even perversity in the appreciation of the evidence having crept into the judgment of the lower Court.

16. On the part of the learned Additional Public Prosecutor regarding the reliability of the evidence and the evidentiary value of the dying declaration would cite a judgment of the Honourable Supreme Court reported in 2003 Crl.L.J. 3717 rendered in P.V.RADHAKRISHNA Vs. STATE OF KARNATAKA, wherein their Lordships have held that, "the dying declaration can be the sole basis for conviction, since a person on death bed is in a situation so solemn and serene equal to obligation of oath the requirement of oath and cross-examination also dispensed with for same reason, that apart, declarant victim being only eye witness exclusion of his statement may deflect ends of justice

17. So far as the reliability and the evidentiary value of the dying declaration is concerned, though the same has not been adduced before a Court of law, muchless with opportunity for the other side to cross-examine the witness, much importance is given to the dying declaration relying on the legal maxim "nemo moriturus proesumitur mentiri" meaning that "a man will not meet his maker with a lie in his lip". Since, at the verge of his life and just prior to death, this dying declaration has also been given it has to be fully relied on particularly since no other circumstances broughtforth on the part of the defence in order to show that either the dying declaration has been influenced by alien agency such as relatives or the

police or even in the manner that it has been broughtforth. No doubtful circumstances have been created since the same has been perfectly done on the part of the Magistrate in the presence of the duty doctor, while the patient was conscious enough and fit enough to adduce the dying declaration and therefore, in accordance with the legal principles held by the upper forums of law, particularly by the Honourable Apex Court in many of its judgments that a conviction could sustain solely dependant on the dying declaration and therefore, since here is a case with the strong dying declaration supported by the other circumstances such as the medical evidence and the motive alleged particularly without any confusion being caused and pointed only towards a single accused with the strong motive of sexual manipulation by the appellant, this Court has to rely on such strong evidence adduced, inspite of the so called three witnesses P.Ws. 1 to 3 having failed to speak to the expectation of the prosecution and therefore, not only on the dying declaration, but also on such circumstances favouring the occurrence to have taken place at the time, place and in the manner alleged, this Court does not find any reasonable cause to make its interference into the well considered and merited judgment of the Court of Sessions Judge, Nagapattinam and hence, the following judgment as regards the conviction and sentence for the commission of the offence under Section 302 I.P.C.

18. So far as the other Sections under which also the accused had been charged that is under Sections 449 and 341 I.P.C. he came to be found guilty for the offence under Section 449 I.P.C. for having trespassed into the house of the deceased and committed the offence. The trial Court itself has held not proved so far as the commission of the offence alleged under Section 341 I.P.C. is concerned. This Court does not want to cause its interference so far as the acquittal decision arrived at by the lower Court regarding the commission of the offence under Section 341 I.P.C. is concerned. However, the commission of the offence under Section 449 I.P.C. is concerned since this Court is able to come across the investigating Officer giving the glimpse of the case to the effect that the appellant/accused being the relative of the deceased and his wife , he is stated to have been living with them in one and the same house having a common mess and therefore, question of tresspass into the house does not arise at all and hence, this Court does not find it proper on the part of the trial Court to arrive at its conclusion finding him guilty for the offence of tresspass under Section 449 I.P.C. and therefore, the conviction and sentence held and awarded by the trial Court under Section 449 I.P.C. has to be done away with and the same is ordered accordingly.

In result,

i.the above Criminal Appeal is partly allowed in the manner given below;
ii.so far as the conviction and sentence arrived at by the Court of Principal Sessions Judge, Nagapattinam, for the commission of the offence under Section 302 I.P.C. is concerned, the same are confirmed and the sentence of imprisonment for life is upheld;

iii.so far as the lower Court holding the accused guilty of the commission of the offence under Section 449 I.P.C. is concerned, the conviction and sentence to undergo rigourous imprisonment for five years are set aside for the reasons assigned in the foregoing paragraphs.

Index :Yes
Internet: Yes
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To

1. The Sessions Judge, Nagapattinam.

2. Mr.E.Raja, Addl. Public Prosecutor, High Court,Madras.

4. The Inspector of Police, Edaiyur Police
Station, Nagai District.